



**THE ATTORNEY GENERAL
OF TEXAS**

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AUSTIN 11, TEXAS

December 20, 1954

Hon. Thomas B. White, Chairman
Board of Pardons and Paroles
Austin, Texas

Opinion No. MS-165

Re: Possible conflict between
Section 12 of Article 781b,
V.C.C.P., and Article 962,
V.C.C.P., relating to the
eligibility for parole.

Dear Mr. White:

You have asked for the opinion of this office concerning the following question submitted in your letter of recent date:

Is Section 12 of Article 781b, Vernon's Code of Criminal Procedure, in conflict with Article 962, Vernon's Code of Criminal Procedure?

Article 962 is derived from Section 3, Chapter 43, Acts 32nd Legislature, 1911. As codified, it reads as follows:

"Any prisoner now serving or who may be sentenced to serve a term of imprisonment in the penitentiary, shall be paroled, if the prisoner so desires, three months before the expiration of his term of service, after deducting from his sentence all commutations for good behavior, and such parole shall extend until such prisoner shall violate the parole rules or until the expiration of such prisoner's original term of imprisonment, unless terminated by the restoration of citizenship by the Governor."

In 1947, the Adult Probation and Parole Law was enacted (Ch. 452, Acts 50th Leg., 1947, p. 1049) and codified by Vernon as Article 781b, V.C.C.P.

Section 12 sets out the requirements to be met for eligibility for parole as follows:

"The Board is hereby authorized to release on parole with the approval of the Governor any person confined in any penal or correctional institution in this State, except persons under sentence of death, who has served one-

third (1/3) of the maximum sentence imposed, provided that in any case he may be paroled after serving fifteen (15) years. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor. (Emphasis added throughout.)

"Within one year after his admission and at such intervals thereafter as it may determine, the Board shall secure and consider all pertinent information regarding each prisoner, except any under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made.

"Before ordering the parole of any prisoner, the Board may have the prisoner appear before it and interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the Board believes that he is able and willing to fulfill the obligations of a law abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be amenable to the orders of the Board. . . ."

Section 34 of Article 781b repeals all laws and parts of laws in conflict therewith.

It is clear that an irreconcilable conflict exists between the above quoted sections. However, the conflict is resolved by the application of the established rule of statutory construction, leges posteriores priores contrarias abrogant (subsequent laws repeal prior conflicting ones) in favor of the latest enactment. Goodwin v. State, 65 Tex. Crim. 98, 143 S. W. 939 (1912); Austin v. State, 61 Tex. Crim. 573, 135 S. W. 1167 (1911); Ex Parte Spann, 122 Tex. Crim. 314, 54 S.W. 2d 510 (1932).

The conflict is further pointed up by the fact that Section 11 of Article IV of the Constitution of Texas places the powers of clemency exclusively in the hands of the Governor and the Board. Ex Parte Anderson, 149 Tex. Crim. 139, 192 S. W. 2d 280, 282 (1946).

Furthermore, parole of a convict is not a right but a mere privilege. State v. Horton, 31 Ala. App. 71, 14 So. 2d 557, 560 (1943);

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People v. Jennings, 250 N.Y. 239, 241, 165 N.E. 277, 278 (1929); Pinkerton v. State, 29 Ala. App. 472, 476, 198 So. 157 (1940); or an act of grace and not a matter of right. Ex parte Anderson, 149 Tex. Crim. 139, 192 S.W. 2d 280, 282 (1946); People v. Ragen, 400 Ill. 191, 203, 79 N.E. 2d 479, 484 (1948).

You are, therefore, advised that Article 962, V. C. C. P., is inoperative for the above reasons.

Yours very truly,

JOHN BEN SHEPPARD
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By

Robert O. Fagg
Assistant

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